INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Question Presented	2
Statute Involved	2
Statement of the Case	2
Argument	5
Conclusion	7

TABLE OF AUTHORITIES

CASES

Atkinson v. Sinclair Refining Company, 370 U.S. 238 (1962)	6
Gateway Coal Company v. Mine Workers, 414 U.S. 368 (1974)	6
International Union of Operating Engineers, Local 150, AFL-CIO v. Flair Builders, 406 U.S. 487 (1972)	5
United Steelworkers of America v. Warren and Gulf Navigation Company, 363 U.S. 574 (1960)	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-425

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL No. 18, AFL-CIO,

Petitioner,

v.

THE DAYTON POWER AND LIGHT COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit and the opinion of the United States District Court for the Southern District of Ohio are set forth in the Petition.

JURISDICTION

The jurisdictional requirements are adequately set forth in the Petition.

QUESTION PRESENTED

Whether Respondent agreed pursuant to a Memorandum of Understanding to submit to arbitration any dispute between it and Petitioner.

STATUTE INVOLVED

The pertinent provisions of Section 301 (a) of the Labor Management Relations Act (29 U.S.C. Sec. 185 (a)) are set forth in the Petition at p. 2.

STATEMENT OF THE CASE

The Dayton Power and Light Company (Dayton) is one of three public utilities which own the J. M. Stuart Electric Generating Station (Stuart Station) on the Ohio River (Petition p. 14).[1] Pursuant to agreements between the owners, Dayton has acted for the other two utility companies and is responsible for the construction and operation of Stuart Station (A.[2] pp. 18, 22; Petition p. 14). Dayton employed Maxon Construction Company (Maxon) as construction manager on the project (Petition p. 14). Maxon in its capacity as construction manager and as an agent, entered into a Memorandum of Understanding, dated July 11, 1967, with the South Central Ohio Building and Construction Trades Council, of which Petitioner Union is a constituent member (A. pp. 18, 23; Petition p. 14). The Memorandum of Understanding provides:

> "Memorandum of Understanding
>
> Between Maxon Construction Company, Inc., Construction Manager for the J. M. Stuart Electric Generation Station project on the Ohio River in Adams County, Ohio, representing the Owners of the Station, and the South Central Ohio Building and Construction

[1] All citations preceded by "Petition" are the pages of Petitioner's Petition for a Writ of Certiorari filed with this Court.

[2] All citations preceded by "A." are to pages of the Appendix filed with the Court of Appeals.

Trades Council, representing all craft local unions having jurisdiction over building construction work at the site of said project.

This understanding applies to all building construction work on the above project. Its provisions shall be effective on July 17, 1967 and shall remain in effect through completion of the project.

1. Except as provided below, the provisions of the various craft agreements presently prevailing in the area in which the project is located, as renewed or extended through due process of negotiation between the parties *thereto*, shall govern all building construction work at the project site.

2. Exceptions to the above are as follows:

   a. For crafts whose agreements provide them no travel allowance or a travel allowance of less than $2.50 per day, each workman shall be paid a total travel allowance of $2.50 per day.

   b. For crafts whose agreements provide them no payment or payment of less than two (2) hours' show-up time in the event they are not put to work because of weather conditions, each workman shall be paid a total of two (2) hours' show-up time in such event. However, under these circumstances, the employee will be obliged to remain at the site during the two (2) hour period, at the request of the contractor(s), pending possible improvement in the weather.

3. In consideration of the concessions enumerated above, all crafts pledge that there will be no strikes (other than area-wide strikes during contract renewal negotiations), walkouts, or work slow-downs during the life of the project. All crafts agree to accept jurisdictional work assignments as made by the various contractors and to process any disputes therewith as provided in the Procedural Rules and Regulations of the National Joint Board for Settlement of Jurisdictional Disputes, As Amended. (In this connection, it is understood that the various contractors will also conduct themselves in accor-

> dance with said Procedural Rules and Regulations.) It is agreed that any grievances between local union(s) and contractor(s) shall be settled in accordance with the grievance machinery provided in the craft agreement(s) or, if none is so provided, by arbitration." (Emphasis supplied)

Dayton is neither a contractor nor a member of a local union (A. pp. 19, 20, 25; Petition p. 15).

This action was initiated in the United States District Court for the Southern District of Ohio, Western Division by Petitioners seeking to require Dayton to arbitrate alleged grievances under Petitioner's contract with the Associated Contractors of Ohio, Inc., pursuant to the Memorandum of Understanding. Dayton is not a member of the Associated Contractors of Ohio, Inc. (A. pp. 10, 20, 24; Petition p. 14). In denying Petitioner's motion for summary judgment the District Court held that "Dayton did not agree that any dispute between it and a union with respect to anything would be the subject of any grievance or arbitration proceeding. . . . It involves a dispute between Dayton and a labor union--between the owner and the union, as distinguished between the contractor and a union. We simply cannot find anything in the Memorandum of Understanding which constitutes an agreement between the owner and a union working on the project to arbitrate anything." (Petition p. 20.)

Upon Petitioner's appeal to the United States Court of Appeals for the Sixth Circuit, the Court affirmed the judgment in favor of Dayton concluding: "It thus appearing that the unambiguous language of the 'Memorandum of Understanding' militates against the position asserted by appellant, we hold that the district court's order dismissing the complaint was correctly entered, and the judgment in favor of Dayton is, therefore, affirmed." (Petition p. 15.)

ARGUMENT

The decision of the Court of Appeals in affirming the District Court is clearly correct and does not conflict with any decision of this Court.

The sole issue is whether or not the Memorandum of Understanding requires Dayton to arbitrate any dispute with the South Central Ohio Building and Construction Trades Council or any of its members. This Court, in one of the Trilogy decisions, *United Steelworkers* v. *Warren & Gulf Navigation Company*, 363 U.S. 574 (1960) at page 582 stated:

> "The Congress, however, has by § 301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate. *For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit.*" (Emphasis supplied)

The Courts below decided that there was no *agreement to arbitrate.*

Petitioners place great reliance on the *Flair* decision, *International Union of Operating Engineers, Local 150, AFL-CIO* v. *Flair Buildings*, 406 U.S. 487 (1972). *Flair* is readily distinguishable from this case and in fact supports Respondent's position.

Flair did not dispute that it had agreed to arbitrate "any difference" had with the union. Its position was that the arbitration clause did not require arbitration of the defense of laches which it had raised. The issue before the Court was not, as here, the lack of an agreement to arbitrate.

Furthermore, Flair entered into the agreement in the capacity of contractor and not as an owner. Flair agreed to incorporate the terms and conditions of the master craft

agreement and had agreed to an arbitration clause. However, in this case, the Memorandum of Understanding unequivocally demonstrates that Dayton and the union working on the project did not agree to arbitrate any issue.

This Court, at page 491 of the *Flair* decision stated:

> "Of course, nothing we say here diminishes the responsibility of a court to determine whether a union and employer *have agreed to arbitration.* That issue, as well as the scope of the arbitration clause, remains a matter for judicial decision." (Emphasis supplied)

See further *Atkinson* v. *Sinclair Refining Company*, 370 U.S. 238 (1962); *Gateway Coal Company* v. *Mine Workers*, 414 U.S. 368 (1974).

The Memorandum of Understanding, clearly calls for arbitration only where a dispute between a *contractor* and a labor organization is involved. Dayton was a party to said Memorandum of Understanding as an *Owner* and not as a contractor. Dayton is neither an employer nor a contractor in its relationship with the Operating Engineers or any of the other craft unions. Dayton has no labor-management contract with the Operating Engineers nor is it the employer of any member of the Operating Engineers or any other craft union. There is no provision in the Memorandum providing for arbitration between Dayton and a union including the Operating Engineers. The final sentence of the Memorandum of Understanding provides:

> "It is agreed that any grievance between *local union(s)* and *contractor(s)* shall be settled in accordance with the grievance machinery provided in the craft agreement(s) or if none is so provided by arbitration." (Emphasis supplied)

The decisions below are manifestly correct and there is no conflict with any other decisions of this Court. Peti-

tioner asserts that to allow the decision of the Court of Appeals to stand in this case "would severely damage the primacy of the arbitrator in labor dispute settlement" (Petition p. 11). However, Petitioners statement presupposes that Respondent has agreed to arbitrate. Arbitration is the primary means of resolving labor disputes *but only where the parties have agreed to arbitrate.* It is this distinction which this Court has consistently recognized as the prerogative of the courts to decide.

CONCLUSION

This Court should deny Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

JOHN ROBERT NEWLIN
25 North Main Street
Dayton, Ohio 45402
(513) 222-0441, Ext. 7212
Attorney for The Dayton Power and Light Company, Respondent

Of Counsel:
JAMES R. MACK
S. F. KOZIAR